

Eric G. Lasker (Admitted *Pro Hac Vice*)
 Matthew J. Malinowski (Admitted *Pro Hac Vice*)
 HOLLINGSWORTH LLP
 1350 I Street, N.W.
 Washington, DC 20005
 Telephone: (202) 898-5800
 Facsimile: (202) 682-1639
 elasker@hollingsworthllp.com
 mmalinowski@hollingsworthllp.com

Steve R. Lowenthal (State Bar No. 104655)
 FARELLA BRAUN + MARTEL LLP
 235 Montgomery Street, 18th Floor
 San Francisco, CA 94104
 Telephone: (415) 954-4400
 Facsimile: (202) 954-4490
 slowenthal@fbm.com

Attorneys for PaintCare, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

GREENCYCLE PAINT, INC., a California corporation,

Plaintiff,

v.

PAINTCARE, INC., a Delaware corporation;
 CLEAN HARBORS ENVIRONMENTAL SERVICES, INC.; a Massachusetts corporation;
 STERICYCLE ENVIRONMENTAL SOLUTIONS, INC., a Delaware corporation; and
 DOES 1-10,

Defendants.

Case No. 15-cv-04059-MEJ

Hon. Maria-Elena James

**PAINTCARE, INC.'S OPPOSITION
 TO PLAINTIFF'S MOTION TO
 MODIFY CASE MANAGEMENT
 ORDER**

Date: April 26, 2018
 Time: 10:00 a.m.
 Courtroom: B-15th Floor

Action filed: August 4, 2015
 Removed: September 4, 2015
 Trial Date: October 29, 2018

HOLLINGSWORTH LLP
1350 I STREET, NW
WASHINGTON, DC 20005

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1350 I STREET, NW
WASHINGTON, DC 20005

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PRELIMINARY STATEMENT

Defendant PaintCare, Inc. (“PaintCare”) submits the following memorandum of points of authorities in opposition to plaintiff GreenCycle Paint, Inc.’s (“GreenCycle”) Motion to Modify Case Management Order (“Motion”).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

GreenCycle’s Motion should be denied because GreenCycle has not satisfied the minimal requirements for securing the relief requested. GreenCycle has not met its burden to show good cause for seeking modification of this Court’s scheduling order, nor can it show that PaintCare will not be prejudiced by this late amendment. Additionally, GreenCycle’s failure to produce its CEO’s handwritten notes until weeks *after* his deposition further serves as a bar to the relief sought.

II. STATEMENT OF FACTS

GreenCycle’s Delay in Agreeing to Search Terms

PaintCare sent GreenCycle a proposed list of search terms for culling electronically stored information on July 18, 2017.¹ A few days later, on July 21, 2017, the parties held their first meet and confer call to discuss discovery-related issues, during which counsel for PaintCare identified the relevant document custodians whose e-mail would be searched for potentially responsive documents.²

On August 7, 2017, counsel for PaintCare sent an email to GreenCycle’s counsel informing plaintiff that an initial collection of e-mail documents from the relevant document custodians returned “an extremely large amount of data,” specifically, 90.1 GB.³ As a result, PaintCare informed GreenCycle that the parties will “need to come to some agreement on

¹ Brandt Declaration (Doc. No. 116) at ¶ 4.

² Omidi e-mail (July 21, 2017 05:37 PM EST) (Ex. 1).

³ Malinowski to Omidi e-mail (Aug 7, 2017 07:20 AM EST) (Ex. 2).

appropriate search terms to narrow our document collection/production efforts.”⁴ PaintCare also re-sent its list of proposed search terms. In response to PaintCare’s suggestion to narrow search terms in order to more efficiently move discovery forward, counsel for GreenCycle refused, stating: “I’ll tell you that the terms you’ve proposed appear to be far too narrow – especially if you are only collecting and searching ESI created or generated between April 1, 2012 and August 4, 2015.”⁵ Two days later, counsel for PaintCare replied, and informed GreenCycle that the date plaintiff filed its initial complaint in 2015 was a reasonable cut-off date given the “overwhelming volume of data between 2015 and now.”⁶ Counsel also explained that the total size of PaintCare’s Box data was about 1.5 terabytes, which was between 4 million and 14 million pages of documents⁷ (as compared to the volume of plaintiffs’ production of a total of 14,489 pages). Noting the voluminous amount of documents, counsel for PaintCare again implored GreenCycle: “[t]his is why we obviously need search terms.”⁸ Counsel for PaintCare concluded by asking GreenCycle to “[p]lease make a counter-proposal on terms you think more appropriate, or how you might like to phase the collection....”⁹

The parties held their second meet and confer conference call regarding discovery-related issues on August 22, 2017, twelve days after PaintCare requested a counter-proposal on search terms.¹⁰ By September 12, 2017, nearly a month after PaintCare requested that GreenCycle provide a counter-proposal on search terms, GreenCycle had still neglected to do so.¹¹ Counsel again implored GreenCycle to submit proposed terms, specifically asking for GreenCycle to

⁴ *Id.*

⁵ Omid to Malinowski e-mail (Aug 8, 2017 07:30 PM EST) (Ex.3).

⁶ Malinowski to Omid e-mail (Aug 10, 2017 01:36 PM EST) (Ex.4).

⁷ *Id.*

⁸ Malinowski to Omid e-mail (Aug 10, 2017 01:36 PM EST) (Ex.4).

⁹ *Id.*

¹⁰ Brandt e-mail (Aug. 22, 2017 03:07 PM EST) (Ex. 5).

¹¹ Malinowski to Brandt e-mail (September 12, 2017 03:37 PM EST) (Ex. 6).

1 “[p]lease provide your suggested terms so we can get on with discovery.”¹² This followed a
 2 similar request made six days earlier.¹³ Finally, on September 14, 2017, one month and four
 3 days after PaintCare’s initial request, GreenCycle provided its list of proposed search terms.¹⁴

4 Upon receipt of GreenCycle’s list of proposed search terms, PaintCare discovered that
 5 the terms returned a disproportionately large and unworkable volume of documents.¹⁵
 6 Specifically, plaintiff’s suggested list returned “hits” on nearly 70% of all possible e-mails, with
 7 a total page count between 2 million and 3 million pages.¹⁶ PaintCare informed plaintiffs that
 8 “we should be able to easily agree to eliminate these types of out of context overbroad terms and
 9 focus in on the documents that are truly relevant to this case.”¹⁷ In response, the parties held a
 10 third meet and confer conference call on October 6, 2017 to discuss further culling down the
 11 document production.¹⁸ Finally, after the call on October 6, 2017, GreenCycle reached an
 12 agreement with PaintCare on an acceptable set of search terms.¹⁹

13 **PaintCare’s Multiple Productions**

14 Pursuant to agreement by the parties, PaintCare produced documents to GreenCycle on a
 15 rolling basis.²⁰ In total, PaintCare has produced approximately 208,801 pages of documents.
 16 PaintCare’s production of documents is as follows:

17 **November 8, 2017:** 37,657 pages of documents produced to GreenCycle.

18 **November 27, 2017:** 75,316 pages of documents produced to GreenCycle.

19 **January 11, 2018:** 12,112 pages of documents produced to GreenCycle.

20
 21 ¹² *Id.*

22 ¹³ See Malinowski to Brandt e-mail (September 6, 2017 10:22 AM EST) (Ex. 7).

23 ¹⁴ Brandt to Malinowski e-mail (September 14, 2017 01:27 PM EST) (Ex. 8).

24 ¹⁵ See Malinowski to Brandt e-mail (September 27, 2017 11:06 AM EST) (Ex. 9).

25 ¹⁶ *See id.*

26 ¹⁷ *Id.*

27 ¹⁸ Malinowski to Brandt e-mail (September 28, 2017 8:05 AM EST) (Ex. 10).

28 ¹⁹ See Brandt to Malinowski e-mail (October 6, 2017 2:42 PM EST) (Ex. 11).

²⁰ Brandt Declaration (ECF No. 116) at ¶ 5.

1 **February 9, 2018:** 27,457 pages of documents produced to GreenCycle.

2 **March 5, 2018:** 308 pages of documents produced to GreenCycle.

3 **March 9, 2018:** 55,951 pages of documents produced to GreenCycle.

4 In December 2017, GreenCycle requested that PaintCare expand its production to include
5 e-mails from three additional custodians.²¹ PaintCare agreed to process GreenCycle's request,
6 despite the fact that it included thousands more e-mails that required review and production.²²

7 Plaintiff complains that the March 5th and March 9th productions have somehow
8 prejudiced their ability to prepare for the depositions of PaintCare employees Marjaneh
9 Zarrehparvar (on March 27th) and Fred Gabriel (on March 29th).²³ But those productions, the
10 majority of which included documents that required additional review and processing for
11 potential privilege redactions, have negligible if any relevance to Ms. Zarrehparvar's and Mr.
12 Gabriel's depositions. For example, the 152,542 pages produced by PaintCare from November
13 8, 2017 through February 9, 2018 included 19,235 documents from Ms. Zarrehparvar and 5,868
14 documents from Mr. Gabriel. Conversely, the March 5th and March 9th productions included
15 only 2,808 and 467 documents from those witnesses, respectively. And plaintiffs still had over
16 two weeks between that last production on March 9th and the March 27th and March 29th
17 depositions to review the documents for information that they might want to use at those
18 depositions. Thus, plaintiff was not prejudiced in its ability to prepare for those depositions or in
19 any other way by PaintCare's March 2018 productions.

20 **GreenCycle's withholding of Relevant Documents**

21 During the January 31, 2018 deposition of Alan Beilke, owner and CEO of GreenCycle
22 Paint, Inc., it became clear from Mr. Beilke's repeated references to mysterious hand-written
23 notes that GreenCycle had not produced relevant documents prior to the deposition.²⁴

24 ²¹ See Brandt to Malinowski and Madden e-mail (December 18, 2017 12:46 PM EST) (Ex. 12).

25 ²² See Malinowski to Brandt e-mail (January 02, 2018 10:50 AM EST). (Ex. 13).

26 ²³ Pl. Mot. To Modify Case Management Order . 3, (ECF No. 115).

27 ²⁴ (Beilke Dep. Tr. at: 54:10-55:23) (Ex.14).

Specifically, Mr. Beilke referenced his hand-written notes six different times during testimony on numerous different topics.²⁵ Mr. Beilke testified that he had turned the documents over to plaintiffs' counsel well before the deposition.²⁶ Counsel for PaintCare confirmed that the other defendants had not received the documents and indicated that the omission may require follow up.²⁷ The documents in question were not produced to PaintCare until February 26, 2018, nearly five weeks after the deposition for Mr. Beilke concluded.²⁸

III. ARGUMENT

Based on GreenCycle's conduct its motion should be denied in its entirety. Once a court has issued a case management order, the order "may be modified *only* for good cause and with the judge's consent."²⁹ The good cause standard under Rule 16(b) "primarily considers the diligence of the party seeking the amendment," and "[i]f that party was not diligent, the inquiry should end."³⁰ Despite claiming it is unable to comply with the current discovery schedule, GreenCycle has not offered any evidence to show it has been diligent in attempting to maintain the schedule. For this reason alone, GreenCycle cannot show good cause exists. Mistaking the "diligence" inquiry under Rule 16(b) for that of general diligence in conducting discovery, GreenCycle argues that good cause exists because it "exercised diligence in pursuing discovery...."³¹ But this blanket assertion is untrue in any event considering that GreenCycle's

²⁵ (Beilke Dep. Tr. at 47:12-17) (Ex. 14) (regarding when GreenCycle Paint began operating); (Beilke Dep. Tr. at 100:20-24) (Ex. 14) (regarding who Mr. Bielke purchased equipment for GreenCycle Paint from); (Beilke Dep. Tr. at 116:25-117:13) (Ex. 14) (regarding GreenCycle's use of a Vorti-Siv filter to purportedly gain advantage in the recycling market); (Beilke Dep. Tr. at 129:13-130:1) (Ex. 14) (regarding how much ReStore was charging for recycled paint); (Beilke Dep. Tr. at 211:10-19) (Ex. 14) (regarding when Environmental Logistics employee, Marcial Barragan, visited and audited GreenCycle Paint's facility); (Beilke Dep. Tr. at 409:10-15) (Ex. 14) (regarding how much Amazon Recycled Paint was charging for paint).

²⁶ (Beilke Dep. Tr. at 55:24-56:10) (Ex. 14).

²⁷ (Beilke Dep. Tr. at 54:14-24) (Ex. 14).

²⁸ (Letter From Wendel Rosen date 2/22/18; HLLP Received in mail 2/26/18). (Ex. 15).

²⁹ Fed. R. Civ. Pro. 16(b)(4) (emphasis added); *see also Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992).

³⁰ *Johnson*, 975 F.2d at 609.

³¹ Plf's Mot. 3, ECF No. 115.

1 continued refusal to agree to reasonable search terms caused significant and needless delay in the
2 discovery process. Moreover, amending the pretrial schedule is not appropriate in this case, as
3 GreenCycle's withholding of relevant documents precludes GreenCycle from any equitable relief
4 before this court, and any extension of the discovery period would materially prejudice
5 PaintCare.

6 **A. GreenCycle's Claims Do Not Show Good Cause for Granting Its Motion**

7 GreenCycle's claim that it could not review the documents from PaintCare's fifth
8 production prior to the depositions of PaintCare witnesses is meritless, and GreenCycle has made
9 no effort to explain why it could not accomplish such a review in the weeks between the March
10 9, 2018 production and the March 27th and March 29th depositions. Nor has GreenCycle offered
11 any insight into the progress it made in reviewing said documents. Under the good cause
12 standard, "[t]he district court may modify the pretrial schedule 'if it cannot reasonably be met
13 *despite the diligence* of the party seeking the extension.'"³² GreenCycle has not provided any
14 evidence in support of its claim that reviewing documents it had in its possession since March 9,
15 2018, was impossible, despite a diligent effort to do so.³³ Rather, GreenCycle leaves it to this
16 Court to assume, with no factual support, that it is not possible for a legal team with multiple
17 attorneys and ample resources from two large law firms in Oakland, California and Washington,
18 D.C. to review roughly 3500 potentially relevant documents from two different custodians over
19 the course of more than two weeks leading up to their depositions.

20 In bringing this motion, GreenCycle also ignores the fact that it has possessed over
21 150,000 PaintCare-produced documents since February 9, 2018, well before the depositions of
22 PaintCare witnesses or the deadline for discovery. GreenCycle does not explain why PaintCare's
23 previous productions were insufficient to facilitate deposing the witnesses in question.

24 _____
25 ³² See *Johnson*, 975 F.2d at 609 (citing Wright Miller & Kane, *Federal Practice and Procedure*
26 § 1522.1 at 231 (2d ed. 1990) for proposition that "'good cause' means scheduling deadlines
cannot be met despite party's diligence.") (emphasis added).

27 ³³ See *id.*

Moreover, GreenCycle has not presented a single fact suggesting that PaintCare's sixth production contains more probative or relevant information than all of the previous productions. In fact, it appears that GreenCycle did not even conducted a cursory review in an attempt to make such a determination, as this would have revealed that less than six percent of the production consisted of documents from Fred Gabriel or Marjaneh Zarrehparvar . When "the moving party fails to show diligence, the inquiry should end."³⁴ Therefore, GreenCycle's Motion should be denied.

B. GreenCycle Has Not Acted Diligently in Pursuing Discovery

GreenCycle is not entitled to the relief it seeks because GreenCycle's own actions have caused significant delays and the need to cram multiple depositions into the last few days before the discovery deadline. All of the parties knew for over eight months that April 10, 2018 was the Court's deadline for completing both fact and expert discovery,³⁵ but plaintiffs did not even begin asking for available deposition dates until less than two months before that deadline. From the beginning of discovery, GreenCycle consistently delayed timely discovery by ignoring PaintCare's requests for GreenCycle's proposed search terms. Rather than agree to reasonable terms, tailored to locate relevant documents, GreenCycle insisted on overly-broad and disproportionate terms that would have forced PaintCare to review and produce nearly every document and source of electronic information within its custody regardless of its lack of relevance to this case. This necessitated additional negotiation between the parties, and thus caused more delay. GreenCycle then waited until mid-December 2018, almost two months after search terms and custodians had been agreed to, to demand the inclusion of documents from additional custodians. Despite the fact that there was little, if any, basis to suspect these additional custodians possessed relevant documents, PaintCare agreed to conduct a search, which increased the amount of time and resources required to complete PaintCare's production.

³⁴ *Zivkovic v. Southern California Edison Co.*, 302 F.3d 1080, 1087 (9th Cir. 2002).

³⁵ Order Vacating CMC Case Management Order, May 15, 2017 (ECF No. 83).

C. GreenCycle's Post-Deposition Production Should Bar Any Equitable Relief

GreenCycle's failure to produce relevant documents to PaintCare prior to the deposition of Alan Beilke forecloses GreenCycle from being entitled to the equitable relief sought in its Motion. "He who comes in equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief"³⁶ GreenCycle brings this Motion under the guise that it has not had enough time to review all of PaintCare's documents produced in this litigation, prior to witness depositions. But GreenCycle failed to produce Mr. Beilke's handwritten notes—which he specifically referenced numerous times in his deposition as something he would need to review in order to answer certain questions—until weeks after his deposition concluded.³⁷ Despite the fact that GreenCycle's omission was discovered early in Mr. Beilke's deposition,³⁸ GreenCycle's lawyers failed to locate or turn over the notes during any of the breaks or at the conclusion of the first day of testimony. GreenCycle therefore has unclean hands and is precluded from obtaining any equitable relief before this Court on this issue.³⁹

D. Amending the Scheduling Order is Prejudicial to PaintCare

GreenCycle summarily declares that PaintCare will not be prejudiced by an extension of the discovery deadline, and subsequently the deadline to file dispositive motions, as well as the resulting delay in the hearing on dispositive motions. Although the deadline for discovery has not yet passed, delaying the proceedings in this case by extending the deadline will have the

³⁶ *Precision Instrument Mfg. Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806, 814 (1945).

³⁷ *See, e.g.*, Beilke Dep. Tr. at 53:25-54:4 (Ex. 14). (Mr. Bielke testified "from my experience in – just in business is I would keep notes of conversations that I tried to have or, you know, would write a – a date on a page and who I spoke to that day or what I did that day, kind of as an itinerary or an outline.").

³⁸ (Bielke Dep. Tr. at 54:14-16) (Ex.14). (9:48 AM).

³⁹ *See, e.g., Precision Instrument Mfg. Co.*, 324 U.S. 806, 814 (1945).

1 same prejudicial effect.⁴⁰ Delaying the deadline and hearing on dispositive motions to extend
 2 discovery in this case undeniably prolongs the proceedings, which will result in greater cost and
 3 expense of resources for PaintCare. PaintCare—a non-profit organization—has been expending
 4 money and resources defending this litigation for over three years, and plaintiff’s proposed
 5 delays will unjustifiably increase its costs and delay the successful disposition of this case.

6 The records and depositions in this case underscore the frivolous nature of this lawsuit.
 7 In two separate letters sent to counsel for GreenCycle, PaintCare has outlined extensively the
 8 multitude of reasons why GreenCycle cannot meet its burden of proof in this case.⁴¹ This action
 9 should never have been brought in the first place, and GreenCycle’s attempt to delay dispositive
 10 motions is merely a means to needlessly prolong this litigation, further prejudicing PaintCare.

11 CONCLUSION

12 For all the foregoing reasons, PaintCare requests that this Court deny GreenCycle’s
 13 Motion to Modify Case Management Order.
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24 ⁴⁰ See *Solomon v. North American Life Ins. & Cas.*, 151 F.3d 1332, 1339 (9th Cir. 1998) (holding
 25 that a motion on the eve of discovery deadline was properly denied because it would have
 required reopening discovery, thus delaying proceedings).

26 ⁴¹ See Letter from Matthew J. Malinowski, counsel for PaintCare, to Gregory C. Brandt,
 27 counsel for GreenCycle (Feb. 16, 2018) (Ex. 16); Letter from Matthew J. Malinowski, counsel
 for PaintCare, to Gregory C. Brandt, counsel for GreenCycle (March 14, 2018) (Ex. 17).
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HOLLINGSWORTH LLP
1350 I STREET, NW
WASHINGTON, DC 20005

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Respectfully submitted,

Dated: March 29, 2018

By: /s/ Matthew J. Malinowski

Matthew J. Malinowski (Admitted *Pro Hac Vice*)
Attorneys for PaintCare, Inc.

Eric G. Lasker (Admitted *Pro Hac Vice*)
HOLLINGSWORTH LLP
1350 I Street, N.W.
Washington, DC 20005
Telephone: (202) 898-5800
Facsimile: (202) 682-1639
elasker@hollingsworthllp.com
mmalinowski@hollingsworthllp.com

Steve R. Lowenthal (State Bar No. 104655)
FARELLA BRAUN + MARTEL LLP
235 Montgomery Street, 18th Floor
San Francisco, CA 94104
Telephone: (415) 954-4400
Facsimile: (202) 954-4490
slowenthal@fbm.com

HOLLINGSWORTH LLP
1350 I STREET, NW
WASHINGTON, DC 20005

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2018, a true and copy of the foregoing was served upon the following by operation of the Court's Electronic Case Filing System.

Gregory C. Brandt
WENDEL, ROSEN, BLACK & DEAN LLP
111 Broadway, 24th Floor
Oakland, CA 94607-4036
Telephone: (510) 834-6600
Facsimile: (510) 834-1928
Email: gbrandt@wendel.com

Attorneys for Plaintiff
GREENCYCLE PAINT, Inc.

[Raymond J. Etcheverry](#)
[Cory D. Sinclair](#)
[PARSONS, BEHLE & LATIMER](#)
One Utah Center 201 South Main Street, Suite 1800
Salt Lake City , UT 84145
Telephone: (801)-532-1234
Facsimile: (801)-536-6111
Email: Ecf@parsonsbehle.com

Attorneys for Defendant
STERICYCLE ENVIRONMENTAL
SOLUTIONS, Inc.

[Matthew Schechter](#)
[MCMANIS FAULKNER](#)
50 West San Fernando Street, 10th Floor
San Jose , CA 95113
408 279-8700
Email: Mschechter@mcmanislaw.com

Attorneys for Defendant
STERICYCLE ENVIRONMENTAL
SOLUTIONS, Inc.

[Thomas M. Downey](#)
[Rohit A. Sabnis](#)
[BURNHAM BROWN](#)
1901 Harrison Street, 14th Floor
Oakland , CA 94612-3501
Telephone: (510) 444-6800
Facsimile: (510) 835-6666
Email: Rsabnis@burnhambrown.Com
Email: Tdowney@burnhambrown.Com

Attorneys for Defendant
CLEAN HARBORS
SERVICES, INC.

/s/ Matthew J. Malinowski

Matthew J. Malinowski
Attorneys for PaintCare, Inc.